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IN THE

Supreme Court of the United States

KNIGHT & WALL COMPANY, a Florida corporation; SPICOLA HARDWARE COMPANY, INC., a Florida corporation, YOUNKIN SPORTS SUPPLY, INC., a Florida corporation,

Petitioners,

vs.

FARRIS BRYANT, Governor of Florida, TOM ADAMS, Secretary of State, RAY E. GREEN, Comptroller, JAMES W. KYNES, Attorney General, J. EDWIN LARSON, Treasurer, THOMAS D. BAILEY, Superintendent of Public Instruction, and DOYLE E. CONNER, Commissioner of Agriculture, as and constituting the State Revenue Commission, and J. ED STRAUGHN, as Director of the State Revenue Commission,

Respondents.

CASE NO. 1002

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	3
STATEMENT	4
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	18
CERTIFICATE OF SERVICE	19

CITATIONS

CASES:

	Page
Davis v. State, 146 So. 2d 898	3
Locklin v. Pridgeon, 30 So. 2d 102	9
Vallat v. Radium Dial Co., 360 Ill. 407, 196 N.E. 485, 99 A.L.R. 607	10
Husting v. Board of State Canvassers, 159 Wis. 216, 150 N.W. 542, Ann. Cas. 1916 D, 159	10
Cook v. State, 26 Ind. App. 278, 59 N.E. 489	10
Henderson v. Antonacci, 62 So. 2d 5	10
Connally v. General Construction Co., 269 U. S. 385, 46 S. Ct. 126, 70 A. L. Ed. 322	10
Winters v. New York,	L
335 U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840	10
Overstreet v. Ty-Tan, Inc., 48 So. 2d 158	11
Florida National Bank of Jacksonville v. Simpson, 59 So. 2d 751	11
James v. Gerrell, 188 So. 812	18
United States v. Butler, 56 S. Ct. 312, 102 A.L.R. 914	17
STATUTES:	
Chapter 63-527, Laws of Florida	3, 4
MISCELLANEOUS:	
12 Am. Jur., Constitutional Law, Page 282, Sec. 585	9
Fla. Constitution, Declaration of Rights, Section 1 and 12	7
U. S. Constitution, Bill of Rights, Section 1	7

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

Petitioners pray that a Writ of Certiorari issue to review the opinion of the Supreme Court of the State of Florida entered in the above-entitled case on June 30, 1965.

CITATIONS TO OPINIONS BELOW

The Final Decree of the Chancellor is unreported and is part of the record on appeal. The opinion of the Supreme Court of Florida is reported in 178 So.2d 5 (Fla. 1965).

JURISDICTION

The judgment of the Supreme Court of Florida, which was entered on June 30, 1965, affirmed the judgment of the Circuit Court for Leon County, Florida, which held constitutional Chapter 63-527, Laws of Florida, known as "The Wholesale Fishing and Other Equipment Act," which levied a five per cent (5%) tax at the wholesale level generally on fishing, hunting, camping, swimming and diving equipment proposed to finance programs of the Outdoor Recreational Development Council. The Order on Petition for Rehearing was entered on September 13, 1965, and this Court ordered the extending of time to file a Petition for Writ of Certiorari to and including February 10, 1966. The jurisdiction of this Court rests on Section 1257 (3).

QUESTIONS PRESENTED

The Federal question herein involved, namely, that the aforementioned act is invalid because it contravenes and violates Section 1 of the Fourteenth Amendment to the Constitution of the United States, was raised by the Petitioners in their Complaint, and the Circuit Court of Leon County, Florida, ruled in its Order on Petition for Rehearing that it was their opinion that the statute in question did not violate the constitutional rights of the Petitioners of due process and equal protection of the law. The Supreme Court of Florida, in 178 So.2d at pages 7 and 8, ruled on the Federal question as follows:

Lastly appellants contend that the chancellor erred when he held that the act does not offend against the equal protection and due process clauses of the State and Federal Constitutions.

Obviously the objects sought to be taxed are those used in outdoor activities utilizing the natural resources of the State and the funds derived from the taxes are to be used to promote and develop those very activities by financing programs of the outdoor recreation and conservation act of 1963.

Two rules of construction should be brought into play, namely (1) all acts of the legislature are presumed valid and (2) an act should not be toppled unless it be determined invalid *beyond a reasonable doubt*. Davis v. State, 146 So.2d 892.

Indulging the presumption and relying for enlightenment upon the record, the briefs, and the opinion of the able chancellor, we conclude that we should not disturb the decree which held the Act impregnable.

STATUTE INVOLVED

The statute involved is Chapter 63-527, Laws of Florida.

STATEMENT

Petitioners are each corporations organized and existing under the Laws of the State of Florida, and each is engaged in the business of selling fishing, hunting, camping, swimming and diving equipment either at wholesale or retail, from established places of business located within the State of Florida. By Chapter 63-527, Laws of Florida, 1963 (hereinafter referred to as "ACT"), the Florida Legislature has declared in Section 4 (1) that every person is exercising a "taxable privilege who engages in the business of selling at wholesale fishing, hunting, camping, swimming and diving equipment," and further that, "For the exercise of said privilege a tax is imposed and levied," as follows:

> (a) At the rate of five per cent (5%) of the sales tax of each item of fishing, hunting, camping, swimming and diving equipment sold at wholesale in this state; the tax to be computed on gross sales for the purpose of remitting the amount of tax due the state, and to include each and every wholesale sale.
>
> (b) At the rate of five per cent (5%) of the cost price of each item of fishing, hunting, camping, swimming and diving equipment purchased, imported or caused to be imported into this state for resale unless the purchaser thereof can prove that the tax levied by this Chapter has been paid to his supply or vender.
>
> (c) At the rate of five per cent (5%) of the cost price of each item of fishing, hunting, camping, swimming or diving equipment when the same is not sold at wholesale, but is used or stored in the state."

In Section Three (3) of said Act, fishing, hunting, camping, swimming and diving equipment is defined as follows:

> "(3) Fishing, hunting, camping, swimming and diving equipment means and includes any device, implement, tool, article, or object customarily or primarily used, operated, or consumed by participants in the course of and in the furtherance of the recreational pursuit of fishing, whether in salt or fresh water and including the capturing, harvesting, or other obtaining of any creatures from or beneath waters, whether or not the same be regarded as a fish; hunting, whether of animals, birds, foul, fish, reptiles, or other creatures; camping, whether independently of or in conjunction with fishing, hunting, swimming or diving; swimming, whether in salt or fresh water, or diving, whether in salt or fresh water, including but not limited to poles, rods, reels, lines, seines, nets, tackle, tackle boxes, hooks, lures, swivels, sinkers, floats, leader wires, weights, firearms, ammunition, decoys, tents, sleeping bags, camping stoves, diving tanks, diving masks, diving lungs, diving weights and belts, diving regulators, diving suits, water skis, tow ropes, fins, bathing and swiming suits, underwater spears, spear guns, and similar, related, or like items;"

with the following proviso:

> "Provided that fuels, oils, lubricants, motors vehicles and parts thereof, boats and watercraft, motors, engines and parts for boats and watercraft, devices or articles designed or utilized primarily as life-saving, safety, or first aid equipment, and articles of clothing or apparel other than bathing, swimming, or diving suits, shall not be included within this definition."

In Section 6(f) thereof the Act also provides for further exemptions as follows:

> "This act shall not apply to nets and seines, and gear attached to or used directly in connection with same, used for commercial production of fish and other marine life, and such nets and gear are exempted from the payment of the tax herein proposed."

In Section 6 said Act provides that the administrative agency who shall administer the collection of the tax "is empowered to promulgate reasonable rules and regulations to implement and effectuate the purposes of this act," and further that the duty of enforcing the collection of the tax and all other rights and duties thereunder shall lie in the State Revenue Commission.

The Act further provides that all sums collected thereunder shall be deposited in the "the land acquisition trust fund" and that such sum so deposited "may be used for any purposes for which funds deposited . . . may lawfully be use . . . provided that not exceeding 20% of all funds collected under this act shall be used for research and capital outlay for research relating to recreational and commercial salt water fisheries and fishing."

REASONS FOR GRANTING THE WRIT

Petitioners have, and still, make the following contentions as to said Act:

1. Petitioners allege that said Act is void and inoperative because of its uncertainty. It is so incomplete, vague and indefinite that it cannot be executed. Furthermore, Petitioners, and persons similarly situated, cannot determine what the Legislature intended within

a reasonable degree of certainty. Petitioners further say that the Act is so ambiguous that to attempt to give effect to it will produce, and has already produced, resuls not contemplated by the Legislature.

2. Petitioners allege that the attempted classification of the persons and things to be taxed is unreasonable and arbitrary and does not rest on a ground of difference that has a fair and substantial relation to the object of the Legislation.

3. The exemptions in said Act are invalid because they contravene and violate Sections 1 and 12 of the Declaration of Rights of the Constitution of the State of Florida and Section 1 of the Fourteenth Amendment to the Constitution of the United States, and render said statute, as a whole, void.

4. Said Act provides for a criminal penalty against one who violates the provisions thereof and it should therefore be complete, clear and unmistakable in its terms as to what items are to be taxed.

5. Said Act is a taxing statute and as such it comes within the principle of law that statutes imposing taxes must be clear and specific. Because of the uncertainties and ambiguities of the statutes, which would embarked on a new type of taxation in Florida, as to which there are no guidelines, same is invalid and impossible to administer. Persons affected by the Act would not know if and when it applies, or to what.

6. Petitioners allege that said Act is invalid in that it amounts to an attempted expropriation of money from one group for the benefit of another and therefore does not constitute a lawful exercise of the taxing power.

7. Petitioners allege that the effect of the enforcement of said Act would be confiscatory and amount to a deprivation of property of the Petitioners, in violation of the due process and equal protection of the law clauses in the Florida and United States Constitutions.

8. That the general classification of "fishing, hunting, camping, swimming and diving equipment, . . ." unpon which the tax is to be imposed is in itself very broad because equipment used in the pursuit of fishing, hunting, camping, swimming and diving inevitably includes a great variety of items which are used in the pursuit of other activities. As to whether an endless number of items of personal property are "customarily or primarily used, operated, or consumed" in the pursuit of fishing, hunting, camping, swimming or diving is mpossible to determine and leads to the unlimited discretion of the administrative agency the power to place upon a dealer, as defined in Section 3 (2) of said Act, the duty, and the threat of criminal action if he fails to do so, to collect the tax on a great variety of items which actually may be used, operated or consumed in many other fields having no relation whatsoever to the general classification of fishing, hunting, camping, swimming and diving.

The Petitioners are Florida corporations engaged, among other things, in the business of selling at wholesale various items of merchandies or equipment that may or may not be classified as being used customarily or primarily in hunting, camping, swimming and diving. A great variety of items which are used in the pursuit of fishing, hunting, camping, swimming and diving are also used in the purusit of many other activities, and conversely, many items which are used in the pursuit of activities other than fishing, hunting, camping, swim-

ming and diving are also used at times in the pursuit of fishing, hunting camping, swimming and diving, and as to particularly all items sold which would be used in the said named activities of fishing, hunting, camping, swimming and diving it is impossible for the wholesaler or retailer of such goods to know or to determine which pursuit or activity that they will be "customarily or *primarily*" used for. There is a great mass of merchandise which might be considered as borderline items as to whether same are customarily or primarily used in the pursuit of fishing, hunting, camping, swimming and diving, and that there is no one in or out of the business of selling hardware, sporting goods, and other items of merchandise, at wholesale, or retail, who can with any degree of certainty say that same will be used customarily or primarily for such named pursuits. But based on the aforementioned, it is our feeling that the Revenue Commission or the Revenue Commissioner of the State of Florida cannot with any degree of certainty or consistency say what items are primarily and customarily used in fishing, hunting, camping, swimming and diving. Thus, no one, with or without experience in selling the said items, can with any degree of certainty or consistency classify "similar, related or like items."

The Florida Supreme Court in *Locklin v. Pridgeon,* 30 So.2d 102, in an original proceeding in habeas corpus discharged the petitioner on the ground that the statute under which he was held was invalid. The statute in question made it unlawful for a person under color of authority to do an act "not authorized by law".

The Court held:

It appears to be generally conceded that a statute, especially a penal statute, must be definite to be valid. In 12 Am. Juris., Constitutional Law, page 282, Sec. 585, it is said:

'A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'

In *Vallat v. Radium Dial Co.*, 360 Ill. 407, 196 N.E. 485, 99 A.L.R. 607, it is held:

'Law must be complete in all its terms, and definite and certain enough to enable every person, by reading it, to know what his rights and obligations are and how the law will operate when put into execution.'

'If the enactment is so uncertain that the court is unable to determine, with any reasonable degree of certainty, what the legislature intended, or it is so incomplete that it cannot be executed, there is no other course open but to condemn it as void for uncertainty. *State ex rel. Husting v. Board of State Canvassers,* 159 Wis. 216, 150 N.W. 542, Ann. Cas. 1916D, 159.'

'Where the terms of the statute are so uncertain as to their meaning that the court cannot say with reasonable certainty what is intended, it will pronounce the enactment void *Cook v. State,* 26 Ind. App. 278, 59 N.E. 489.'

In *Henderson v. Antonacci* (1952), 62 So.2d 5, Justice Drew, in concurring with the majority in holding a "Blue Law" invalid, made the following statement:

The rule is that a statute of this kind which is so vague that men of common intelligence must guess as to its meaning or differ as to its application violates the *due process* clause under Paragraph 1 of the 14th Amendment to the Constitution of the United States and Paragraph 12 of the Declaration of Rights of the Florida Constitution. 12 Am. Jur. 282, par. 585; *Connally v. General Construction Co.,* 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322; *Winters v. New York,* 333 U.S. 507, 68 S. Ct. 665, 92 L. Ed. 840.

> The statute exempts from its operation 'business or concerns such as . . . tourist attractions, and concessions operated at the place of and in connection therewith, outlying grocery stores . . . drug stores . . .' (Emphasis supplied.) These descriptions of business excepted from the operation of the Act are so vague, inadequate and uncertain that no person, including the appellees, could be sure whether he was lawfully conducting one of the purported excepted businesses or not. Certainly, men of common intelligence would have to guess at what an 'outlying grocery store' was and, in this day and age, a 'Drug Store' could mean anything from a place where drugs alone are sold to one where anything from and aspirin tablet to an automobile could be purchased.

It is well recognized that tax statutes must be clear and unambiguous and must be liberally construed in favor of the taxpayer. In *Overstreet v. Ty-Tan, Inc.* (1950) 48 So.2d 158, the Florida Supreme Court held:

> A cardinal rule for construing taxing statutes requires that they impose the tax in clear and specific terms, otherwise they will be held not to impose it. Taxing statutes should be liberally construed in favor of the taxpayer. It is not within the power of taxing offices or this court to say who shall be taxed or to impose a tax on any person or class unless the Legislature in clear and specific terms authorizes the tax.

The construction placed on a tax statute by the Court is further indicated by the case of *Florida National Bank of Jacksonville v. Simpson* (1952) 59 So.2d 751, in which it was stated:

> " . . . the general rule, which is well established in this, if not in every jurisdiction, that statutes providing for taxation are to be construed strictly as against the state and in favor of the taxpayer."

The Act in question is a *taxing statute* which provides a *penalty* for failure to comply with its terms.

We submit that language of the Act is unclear in that the persons taxed have no way of knowing what is to be taxed. The statute specifies certain items, but the Revenue Commissioner has issued lists which indicate that even he is not certain of what is to be taxed. Items on these lists seem to be far outside of the scope of contemplation of the statute.

The statute attempts to levy the tax on devices, implements, tools or articles, *"customarily or primarily used, operated or consumed"* by participants *in the course of and in the furtherance of* the recreational pursuits of fishing, hunting, camping, swimming and diving. (Subsection (3) of Section 3). This is unclear and incomplete and provides no definite *standards* for taxing officials.

The Act is further uncertain and conflicting in that Section 3(2)(g) defines a *dealer* as a person who receives orders for this equipment "from consumers for use or storage in the state", while Section 3(6) defines sale at retail as sale "to a consumer" (by any person other than the manufacturer).

If the tax is to be levied by dealers, on sales at wholesale, how are we to determine whether or not a transaction between a consumer and seller is taxable in view of the above mentioned conflict?

The Act is further conflicting in that Section 4(1)(a) levies the tax on *sales at wholesale* while Section 3(7) defines "sale at wholesale" as a sale which is not a "sale at retail". In view of the fact that we are not sure what a "sale at retail" is (above), we do not know at what level the tax is being levied.

The Act is further in conflict in that Section 4(1)(a) computes the tax to include "each and every wholesale sale"; while Section 3(7) states, "provided that where the mode or method of sale or distribution of such equipment results in there being *more than one (1) sale at wholesale* prior to the sale at retail, the sale at wholesale shall be deemed to be the sale immediately preceding the sale at retail".

In the case of *James v. Gerrell,* 188 So.812, the Florida Supreme Court in declaring an excise tax on auctions invalid stated:

> The test of validity by which an excise tax will be determined is this: . . . If the objects or businesses taxed are classified, the classification must be on some reasonable basis. The tax must bear a just relation to the cost of protection. If the classification is arbitrary or the amount of the tax is such that it impairs one's rights to engage in a lawful business or unduly hampers the owner in the pursuit of his business or tends to drive large numbers out of business, it will be stricken down.

The Court here held invalid exemptions from taxation of auctioneers who operated year round while taxing other auctioneers.

We submit that there is no reasonable basis for exempting any of the items listed by the Act. Section 3(3) of the Act, after including certain specified items within the contemplation of the tax, states:

> . . . provided that fuels, oils, lubricants, motor vehicles and parts thereof, boats and watercraft, motors, engines and parts for boats and watercraft, devices or articles designed or utilized primarily as life-saving, safety, or first aid equipment, and articles of clothing or apparel other than bathing, swimming, or diving suits, shall not be included within this definition.

Section 6(3)(f) further provides:

> (f) This act shall not apply to nets and seines, and gear attached to or used directly in connection with same, used for commercial production of fish and other marine life, and such nets and gear are exempted from the payment of the tax herein proposed.

The items exempt by Section 3(3) (above) are as frequently used in the pursuance of outdoor recreation, etc., as are the items specifically taxed. There is no possible basis for exemption. Granted that most of the exempt items are already subject to another tax. However, we note that all of the items attempted to be taxed by Chapter 63-527, Laws of Florida, are also subject to the 3% sales tax under Chapter 212, Florida Statutes.

In fact, boats, watercraft and vehicles are probably utilized by outdoorsmen much more than many of the items which are specifically subject to the tax.

Likewise, we find commercial fishermen are exempt from the tax. The fact is that these are the people who will specifically benefit from the funds provided by the tax. Commercial fishermen, by Section 7 of the Act, are the one group of persons who we know are permitted to receive assistance from the funds provided by the tax in question.

The Act attempts to justify the classification by reciting in Section 1(1) the legislative finding that the "tax will be borne either by those persons benefiting directly from such increased and expanded sales, uses, and storages or by those persons directly utilizing the facilities and lands developed or acquired by virtue of the provisions of the outdoor recreation and conservation act of 1963 or otherwise directly receiving the benefits of such act."

In the declaration of legislative findings and intent (Section 1), it is stated that "outdoor recreation is vital and fundamental to the well being of the people and the economy of the state . . . ", and further that the purpose of the Act "is to impose a tax on certain sales, uses, and storages of fishing, hunting, camping, swimming and diving equipment" as is provided or defined therein. And to properly construe the Act we are first confronted with the broad field of recreation as limited to the pursuit of fishing, hunting, camping, swimming and diving. The definition of these pursuits in Section 3(3) of the Act is as follows:

> "(3) Fishing, hunting, camping, swimming, and diving *equipment* means and includes any device, implement, tool, article, or object customarily or *primarily used,* operated, or consumed by participants in the course of and in the furtherance of the *recreational* pursuit of fishing, whether in salt or fresh water and including the capturing, harvesting, or other obtaining of any creature from or beneath waters, whether or not the same be regarded as a fish; hunting, whether of animals, birds, fowl, fish, reptiles, or other creatures; camping, whether independently of or in conjunction with fishing, hunting, swimming or diving; swimming, whether in salt or fresh water, including but not limited to poles, rods, reels, lines, seines, nets, tackle, tackle boxes, hooks, lures, swivels, sinkers, floats, leader wires, weights, firearms, ammunition, decoys, tents, sleeping bags, camping stoves, diving tanks, diving masks, diving lungs, diving weights skis, tow ropes, fins, bathing and swimming suits, underwater spears, spear guns, and similar, related, or like items; *provided* that *fuels,* oils, lubricants, motor vehicles and parts thereof, boats and watercraft, motors, engines and *parts for boats* and watercraft, devices or articles designed or utilized primarily as life-saving, safety, or first aid equip-

ment, and articles of clothing or apparel other than bathing, swimming, or diving suits, *shall not be included* within this definition." (emphasis supplied)

The definition of said pursuits is in very broad language and the exemption in said section adds to the confusion and difficulty of administering said Act. It presents the additional questions as to what is meant by the terms 'fuel", "parts for boats", and devices "utilized primarily as life-saving equipment". Another serious and ambiguous part of the exemption is the question of what are "bathing, swimming, or diving suits", which the Act attempts to throw back in as taxable after exempting clothing.

While it appears that the Act in Section 3(3) above is intended to apply to items used only in recreational pursuits, a further ambiguity is created by the exemption in Section 6(3)(f), which exempts nets, seines and gear used for *commercial* fishing.

We point out the very broad and ambiguous concept of the Act because even in applying it to the items specifically named in the statute, the merchant faces these questions in determining whether to collect the tax:

1. Is the item to be used for recreational purposes?
2. Is it "equipment"?
3. Is it to be used *primarily* for fishing, hunting, camping, swimming or diving?
4. It is exempt because it is a fuel, a part for a boat, or because primarily used as life-saving equipment?

5. Is it a bathing, swimming or diving suit?

6. Is it to be used for commercial fishing?

When the Revenue Commission attempts to expand the list of taxable items to those that are "similar, related or like items", it is also first confronted with the foregoing questions. Added to a determination of these, it then faces the question of what items are similar, related and like. The guide lines are, at best, very obscure and at this point the taxing of further items is left to the judgment of the Commission. No standards whatsoever are prescribed to control the exercise of this delegated power. The Commission is not even required to hold a hearing; it is given a wide open field, unrestrained by any limitation.

We submit that the tax will not be borne equally by those benefiting if the present exemptions stand. There is no recognized basis for the classes of exemptions. It is our belief that the exemptions are arbitrary and oppressive and violate the constitutional principles of due process of law and equal protection of the law. There exists no conceivable regulatory purpose for such arbitrary classifications.

We should also note that these arbitrary exemptions also serve to violate the principle of law that moneys shall not be expropriated from one group for the benefit of another. As previously noted, the legislative findings state that the tax is to be borne by those who will benefit therefrom. However, the commercial fishermen are specifically exempt from taxation and specifically the recipients of benefits.

In the case of *United States v. Butler,* 56 S. Ct. 312, 102 A.L.R. 914, the United States Supreme Court held:

> A tax, in the general understanding of the term, and as used in the constitution, signifies that exaction for the support of . . . The word (tax) has

> never been thought to connote the expropriation of money from one group for the benefit of another. We may concede that the latter sort of imposition is constitutional when imposed to effectuate regulation of a matter in which both groups are interested in respect of which there is a power of legislative regulation. But manifestly no justification for it can be found unless as an integral part of such regulation. The exaction canot be wrested out of its setting, denominated an excise for raising revenue and legalized by ignoring its purpose as a mere instrumentality for bringing about a desired end. To do this would be to shut our eyes to what all other than we can see and understand."

We further point out that the exemptions are not based on any substantial difference in the items included and excluded. In the case of *Henderson v. Antonacci* (supra), the Court in discussing class legislation stated:

> It is necessary that there be a valid and substantial reason to make such laws operate only upon certain classes rather than generally upon all."

We see no valid reason for the classification in that all of the items taxed and all of the items exempt are of the same general class.

We respectfully point out that the statute here involved is not a general sales tax which is applied upon all transactions and uses, except those which are specifically exempted, but is a "selective sales tax" levied at the wholesale level. So far as we have been able to ascertain, it is unlike any tax levied by any State in the Union. By this statute the State of Florida is embarking into a new field with no guidelines, except of the very broadest nature.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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AND

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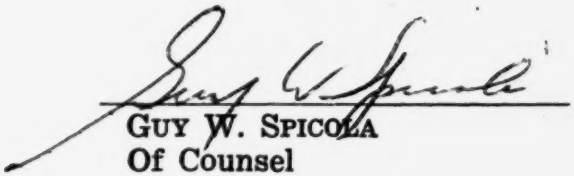
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for a writ of Ceritorari to the Supreme Court of the State of Florida has been furnished to the Attorney General and the Governor of the State of Florida, Tallahassee, Florida, by mail, this 9th day of February, 1966.



GUY W. SPICOLA
Of Counsel